

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE
COUNCIL, INC. AND SIERRA CLUB,

Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Pursuant to Local Rule 7.1 and Rule 26(c) of the Federal Rules of Civil Procedure, Defendants DTE Energy Company and Detroit Edison Company (collectively, "Detroit Edison") respectfully move for a protective order. Such an order is appropriate because Plaintiff ("EPA") seeks discovery that imposes an undue burden, is oppressive, and attempts to circumvent the Federal Rules of Civil Procedure. In further support of this Motion, Detroit Edison refers the Court to its Brief in Support, filed herewith.

In accordance with Local Rule 7.1(a)(2)(A), counsel for Detroit Edison contacted counsel for EPA, and EPA does not concur with Detroit Edison's motion.

Respectfully submitted, this 24th day of November 2010.

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR PROTECTIVE ORDER** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record as follows:

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This 24th day of November, 2010.

/s/ F. William Brownell

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**DEFENDANTS' BRIEF IN SUPPORT OF
THEIR MOTION FOR PROTECTIVE ORDER**

ISSUE PRESENTED

Are Defendants (collectively, “Detroit Edison”) entitled to a protective order under Federal Rule 26(c) when Plaintiff (“EPA”) seeks discovery that imposes an undue burden, is oppressive, and attempts to circumvent the Federal Rules of Civil Procedure?

Defendants’ Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 26

Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth., 234 F.R.D. 4
(D.D.C. 2006)

R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d 262 (6th Cir. 2010)

INTRODUCTION

After failing to secure a hearing on its motion for a preliminary injunction in October without the exchange of any discovery, EPA has elected to seek extensive discovery from Detroit Edison over the course of the past several weeks. This includes written discovery to Detroit Edison and deposition notices for three potential testifying experts and two Detroit Edison employees. While the parties have appeared to resolve their dispute over EPA's written discovery requests, EPA insists that it be permitted to take at least these five depositions in advance of any preliminary injunction hearing, which is currently scheduled for January 19, 2011. EPA's efforts to take these depositions is contrary to the Federal Rules of Civil Procedure, and marks its latest effort to improperly convert this preliminary injunction proceeding into a full-blown trial on the merits. As further set forth below and pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the Court should enter a protective order ordering that these depositions not take place. Such an order is needed to protect Detroit Edison from EPA's attempt to circumvent the Federal Rules and impose additional expense and undue burdens on the company at this preliminary injunction stage of the case.

BACKGROUND

Having already submitted extensive briefs and declarations in connection with Detroit Edison's motion to strike and EPA's motion for preliminary injunction, Detroit Edison will not spend the Court's time repeating the procedural history of this case, the checkered history of EPA's decade-long "enforcement initiative," and the unprecedented nature of EPA's motion. Detroit Edison has shown in its Motion to Strike that EPA's attempt to front-load this complex Clean Air Act dispute in a truncated proceeding is an abuse of process and a waste of judicial resources, particularly since this Court has already ordered that emissions not increase at the unit

at issue—Monroe Unit 2. Doc. Nos. 15 and 33. Likewise, Detroit Edison has shown in its Opposition to Plaintiff’s Motion for a Preliminary Injunction that EPA cannot meet its burden to establish any of the four elements required to obtain a preliminary injunction. Doc. No. 46. For purposes of this motion for a protective order, Detroit Edison will limit its background discussion to the facts relevant to EPA’s effort to take deposition discovery in advance of any preliminary injunction hearing, which Detroit Edison believes is not even necessary given the current posture of the case and the extensive record already before the Court.

A. EPA’s Motion and Demand for an October 2010 Hearing Without Discovery.

EPA filed its motion for preliminary injunction nearly four months ago. Doc. No. 8. The motion included a 36-page brief and extensive declarations from nine witnesses spanning 404 pages. *Id.* At the time EPA filed its motion, EPA did not seek leave of Court to conduct expedited discovery. Nor did it request that Detroit Edison participate in the voluntary exchange of documents or information. Rather, EPA asserted in its motion that Detroit Edison’s “own statements and projections ... show a huge, textbook modification that triggered pollution reduction requirements.” Doc. No. 8 at 2. EPA also stated that “it is important to proceed with the [preliminary injunction] hearing as soon as reasonably practicable,” and advised counsel for Detroit Edison that EPA intended to contact the Court “to determine a time for us to talk ... about scheduling matters.” Email from Benson (EPA) to Bierbower (Detroit Edison) of 8/17/10 (Exhibit A).

Consistent with this approach, EPA rejected as a “non-starter” Detroit Edison’s request for a period of 90 days to respond EPA’s motion. *Id.* Rather, EPA asserted that Detroit Edison “ought to be prepared to respond in the time set by the local rules and the hearing date initially set by the Court.” Doc. No. 23 at 8. Under EPA’s proposed schedule, Detroit Edison’s

opposition to its motion would have been due on August 31, and a hearing on that motion would have occurred over a month and a half ago, and without *any* discovery. *See* Local Rule 7.1(e)(1)(B); Doc. No. 12. The parties addressed the scheduling of a hearing on EPA's motion for preliminary injunction with the Court on August 25, 2010. Following that conference, the Court rejected EPA's aggressive schedule for the preliminary injunction briefing and hearing; entered an order allowing Detroit Edison 90 days to respond to EPA's motion; and set a motion hearing for January 19, 2011. Doc. No. 26. At Detroit Edison's suggestion and to alleviate EPA's concerns about alleged "excess emissions" from Monroe Unit 2, the Court also ordered Detroit Edison "not to utilize the generator that is the subject of the underlying motion to any extent that is greater than it was utilized prior to the Project at issue." Doc. No. 29 at 1-2.

B. EPA's Apparent and Sudden Need for Extensive Discovery.

Having failed in its effort to engage in a trial by ambush, EPA changed its course and suddenly discovered that it would suffer prejudice if it does not receive the discovery that it apparently thought previously was unnecessary for an expedited hearing. Given EPA's previous position regarding the need for an immediate hearing without discovery, its decision to front-load its case in a preliminary injunction proceeding, and the additional expense and burden that such discovery would impose, Detroit Edison opposed EPA's proposal. Doc. No. 40 at 5 ("Defendants believe that no discovery is appropriate in advance of the preliminary injunction hearing."). In particular, in contrast to its earlier position, EPA alleged that "[d]iscovery is [now] needed on the witnesses and documentary evidence that each Party intends to introduce at the preliminary injunction proceeding." *Id.* at 4.

EPA waited to serve its first set of discovery requests so that Detroit Edison's responses would be due on the *same day* its opposition to EPA's motion was due. *See* EPA's First Set of

Discovery Related to Detroit Edison's Preliminary Injunction Opp'n (served October 1, 2010) (Exhibit B). Moreover, EPA's discovery requests were expansive. For example, EPA sought copies of any publication or presentation that any declarant has authored regardless of the subject matter and without time limitation. *Id.* at 9. Compliance would have required Detroit Edison to locate and produce hundreds if not thousands of technical reports, conference presentations and scientific papers, many of which are publicly available and/or unrelated to the subject matter of the case. EPA also requested prior testimony from NSR cases in which *EPA* was a party, as well as copies of documents *EPA* authored. *Id.* These discovery requests were not "narrowly targeted to procure information necessary to fully and fairly investigate the testimony of Defendants [sic] witnesses" as EPA suggests. Letter from Benson (EPA) to Bierbower (Detroit Edison) of 11/5/10 (Exhibit C).

Detroit Edison served its objections to EPA's discovery on November 4, and in response referred EPA to Detroit Edison's opposition brief and attachments filed with the Court earlier that day. *See* Detroit Edison's Obj. and Resp. to EPA's First Set of Discovery Related to Detroit Edison's Preliminary Injunction Opp'n (served on November 4, 2010) (Exhibit D). Like EPA's opening brief, Detroit Edison's opposition was extensive and included eight declarations from potential testifying experts. Doc. No. 46. These materials provided EPA with the vast majority of the relevant and discoverable information it requested. Nevertheless, EPA responded by letter the next day, claimed that Detroit Edison had provided an "empty response," and demanded that counsel for Detroit Edison participate in a meet and confer session the next business day. Letter from Benson (EPA) to Bierbower (Detroit Edison) of 11/5/10 (Exhibit C).

After discussing the issue, the parties agreed to the informal, reciprocal exchange of information and documents in response to more targeted requests. EPA insisted, however, that it

be permitted to take depositions of five of Detroit Edison's declarants to "help narrow and focus th[e] issues for the hearing and provide discovery necessary to prepare for the hearing." Letter from Benson (EPA) to Bierbower (Detroit Edison) of 11/15/10 (Exhibit E). EPA specifically requested depositions of Detroit Edison employees Skiles Boyd and Bill Rogers, and depositions of experts Colin Campbell, Michael King and George Wolff, Ph.D. *Id.* After Detroit Edison resisted this effort, EPA served subpoenas and deposition notices on November 19 on Messrs. Campbell and King, and Dr. Wolff. At the same time, EPA served deposition notices (but not subpoenas) on Messrs. Boyd and Rogers. The deposition notices and/or subpoenas call for these individuals to appear as follows¹:

Witness	Issuing Court	Date	Time	Location
Michael King	D. Colo.	December 6, 2010	9:00 am	Washington, DC
Colin Campbell	E.D.N.C.	December 7, 2010	9:00 am	Washington, DC
Skiles Boyd	N/A	December 9, 2010	9:00 am	Detroit, Michigan
Bill Rogers	N/A	December 10, 2010	9:00 am	Detroit, Michigan
George Wolff	E.D. Mich.	December 13, 2010	9:00 am	Washington, DC

The subpoenas and deposition notices do not specify the subject matter of the depositions, nor do they contain any suggested limitations on their scope or duration.² After Detroit Edison's efforts to seek concurrence on the relief it seeks failed, this motion followed. Local Rule 7.1(a).

ARGUMENT

For good cause, the court may issue a protective order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).

¹ The subpoenas and deposition notices are collectively attached as Exhibit F.

² In a November 10 letter, counsel for EPA did indicate that he was willing to limit the depositions of Messrs. King, Campbell, Boyd and Rogers to four hours each. Letter from Benson (EPA) to Bierbower (Detroit Edison) of 11/15/10 (Exhibit E). However, counsel for EPA also indicated that he would need seven hours to depose Dr. Wolff. *Id.* Even if these proposed limitations are still available, they are not agreeable. For the reasons set forth herein, no deposition discovery is appropriate at this time.

In addition, a party may seek to preclude discovery sought through a subpoena under Federal Rule 26(c). *See, e.g., McNaughton-McKay, Elect. Co. v. Linamar Corp.*, No. 09-CV-1165, 2010 U.S. Dist. LEXIS 59275, at *6 (E.D. Mich. June 14, 2010). In this case, Detroit Edison's motion for a protective order should be granted for two reasons. First, the deposition notices and subpoenas EPA has served impose an undue burden on Detroit Edison and are oppressive given the nature of a preliminary injunction proceeding. Second, EPA's attempt to depose Detroit Edison's potential testifying experts at this early stage in the case violates Rule 26 of the Federal Rules of Civil Procedure.

A. The Pre-Hearing Deposition Discovery EPA Seeks Imposes an Undue Burden and Is Oppressive Given the Nature of Preliminary Injunction Proceedings.

EPA's apparent need for discovery stands in stark contrast to EPA's strong preference that its motion for preliminary injunction be heard without discovery shortly after EPA filed its motion. Despite the invitation to do so, EPA still has failed to adequately explain what has changed since that time and why EPA thinks it needs this discovery now. In connection with EPA's motion for preliminary injunction, the parties have filed 87 pages of briefs, including 26 declarations from 18 witnesses, spanning 1,355 pages. Based on this extensive record, Detroit Edison believes the Court can and should decide EPA's motion on the papers and without any evidentiary hearing. *See, e.g., Big Time Worldwide Concert & Sport Club v. Marriot Int'l*, 236 F. Supp. 2d 791, 794-95 (E.D. Mich. 2003) (determining that no hearing was necessary when court could decide preliminary injunction motion based upon parties' written submissions). Likewise, Detroit Edison believes the Court can and should decide EPA's motion without any further discovery.

Depositions in advance of a preliminary injunction hearing would greatly expand and multiply this litigation, and require substantial time and additional expense for all parties involved. Indeed, to the extent the Court believes pre-hearing deposition discovery is warranted, Detroit Edison also would ask to take depositions of several of EPA's declarants. At a minimum, this would mean that a dozen or so depositions would need to be completed weeks before the preliminary injunction hearing on January 19. As a result, the scope of EPA's requested discovery and Detroit Edison's responsive discovery could lead to the parties conducting nearly all deposition discovery in an expedited fashion. This is contrary to the purpose of a preliminary injunction proceeding. *See, e.g., Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 7 (D.D.C. 2006) ("Surely, plaintiffs are not seeking expedited discovery to gain evidence to get the court to preserve the *status quo*. They want to gather all the evidence they would need to radically transform the *status quo*, on an expedited basis. But, that is not the purpose of a preliminary injunction, nor of the limited discovery that the courts traditionally permit a plaintiff to have to secure it."); *cf. Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("A preliminary injunction is just that—preliminary. It does not substitute for a trial, and its usual office is to hold the parties in place until a trial can take place").³

In fact, even if the parties were willing to limit the number of depositions to a total of 12, that would be more than half of the presumptive limits set by the Federal Rules for an *entire*

³ As a protective measure, Detroit Edison also served its own written discovery on EPA. *See* Detroit Edison's First Set of Interrogs. and Req. for Production to EPA at 1 ("Though Defendants believe that no discovery is appropriate in advance of any preliminary injunction hearing, Defendants serve these requests in the event the Court finds that some limited discovery should be permitted. In that case, Defendants request that Plaintiff respond to these discovery requests within thirty (30) days from the date of service or within (5) days of the Court's determination, whichever is later.") (Exhibit G).

case. Fed. R. Civ. P. 30(a)(2)(A). Moreover, though Dr. Wolff and Messrs. Boyd and Rogers are located in the Detroit area, the remaining witnesses reside all over the country, including Denver, Colorado; Raleigh, North Carolina; Chattanooga, Tennessee; Seattle, Washington; Novato, California; Chicago, Illinois; Alhambra, California; Boulder, Colorado; Central, South Carolina; Cambridge, Massachusetts; Columbus, Ohio; and Columbia, Maryland.

The parties cannot complete—much less analyze—the deposition testimony of multiple witnesses over the next few weeks. This is especially true given the intervening holiday periods, when many critical witnesses and employees are out of the office and difficult to reach. Likewise, Detroit Edison does not have adequate time to prepare its potential expert witnesses and employees for depositions, and also determine the host of other issues such as whether any testimony would breach any nondisclosure obligation or whether any testimony would constitute confidential information that may be subject to a protective order in another New Source Review case.⁴ Moreover, Detroit Edison needs to focus its attention on preparing for the hearing itself, which includes reviewing with its potential testifying experts and witness the extensive reply and declarations EPA filed on November 18. Doc. No. 58. In short, consistent with the purposes of a preliminary injunction proceeding and to avoid further expense and burdens on Detroit Edison, the Court should not allow these depositions to proceed but instead should allow the parties to focus their efforts preparing for a hearing should the Court elect to hold one.

B. EPA's Attempt to Depose Detroit Edison's Potential Testifying Experts Is Premature and Violates the Federal Rules of Civil Procedure.

As noted, Detroit Edison retained Michael King, Colin Campbell and George Wolff as experts to assist the company and its attorneys in preparing its opposition to EPA's motion for

⁴ EPA cannot claim that it had no choice on the timing of its subpoenas and deposition notices. EPA could have moved for expedited discovery, but failed to do so.

preliminary injunction and to potentially serve as testifying experts at trial. Specifically, these experts were retained to gather, compile, and review materials related to the allegations of EPA's complaint, as well as assertions made by EPA and its declarants in connection with its motion for preliminary injunction. EPA seeks to depose these experts in early December.

Rule 26(b) of the Federal Rules of Civil Procedure—which governs expert testimony—provides for the establishment of deadlines by the Court for expert discovery including deadlines for the identification of testifying experts, disclosure of expert reports and timing of expert depositions. Federal Rule 26(b)(4)(A) specifically provides that a testifying expert shall not be deposed until an expert report is provided. As a result, EPA cannot commence deposition discovery of these experts' potential trial opinions when this Court has not set expert deadlines and no expert reports have been exchanged. *See, e.g., Perry v. United States*, No. 96-CV-2038-T, 1997 U.S. Dist. LEXIS 23875, at *10 (N.D. Tex. Feb. 4, 1997) (“Until the defendant is required to make a final decision regarding expert testimony, therefore, the court finds that the plaintiffs’ attempt to discover expert information is premature.”); *In re Shell Oil Refinery*, 132 F.R.D. 437, 440 (E.D. La. 1990) (finding that prior to the dates set by the court for disclosure of identity of experts to be called at trial, for exchange of expert reports, and for expert depositions, party was under “no obligation to decide which experts it will call at trial or disclose information about any experts expected to be called at trial,” and thus any “attempt to obtain discovery from experts expected to be called at trial is premature”).

These rules are not rendered inapplicable here simply because these potential testifying experts submitted declarations on behalf of Detroit Edison in opposition to EPA's motion for a preliminary injunction. *See, e.g., Plymovent Corp. v. Air Tech Solutions, Inc.*, 243 F.R.D. 139, 146 (D.N.J. 2007) (granting a motion to quash a subpoena seeking the deposition of an expert

who submitted report opposing a motion for preliminary injunction where that expert was designated as a consulting witness after originally designated as a testifying witness). Like EPA, Detroit Edison is free to make and revise decisions about experts before the time set by the Court for expert discovery, just as those experts should be free to work on and revise their expert analyses as the facts develop through the traditional means of discovery. *See, e.g.*, Declaration of Dr. Wolff at 33 (“This declaration does not represent the full extent of my opinions, which may be included in future report(s).”) (Doc. No. 46-2).

In *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262 (6th Cir. 2010), the Sixth Circuit recently affirmed the district court’s refusal to compel the deposition of the defendant’s non-testifying expert even though the defendant had originally designated him as a testifying expert. The Sixth Circuit observed that Rule 26(b)(4)(A) “says nothing about the timing of the deposition of an expert witness, *except that* if the expert witness is required to file a report [as here], the deposition may *only occur after the report is provided*.” *Id.* at 272 (emphasis added); *see also id.* at 273 (““Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be.””) (quoting Fed. R. Civ. P. 26, advisory committee’s note (1970)).

Here, EPA will have ample time to obtain expert materials and prepare its cross-examination of Detroit Edison’s testifying experts during the time period set forth by this Court. Until such time, deposition discovery of Detroit Edison’s potential testifying experts is premature, and the Court should enter a protective order directing that such depositions not take place until testifying experts are finally designated and expert reports provided under the provisions of Rule 26.

CONCLUSION

For these reasons, Detroit Edison's motion for a protective order should be granted.

Respectfully submitted, this 24th day of November 2010.

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record as follows:

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This 24th day of November, 2010.

/s/ F. William Brownell

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**INDEX OF EXHIBITS TO DEFENDANTS' BRIEF IN
SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER**

<u>Exhibit</u>	<u>Description</u>
A	Email from Benson (EPA) to Bierbower (Detroit Edison) of 8/17/10
B	EPA's First Set of Discovery Related to Detroit Edison's Preliminary Injunction Opposition (served October 1, 2010) (Exhibit B)
C	Letter from Benson (EPA) to Bierbower (Detroit Edison) of 11/5/10
D	Detroit Edison's Objections and Responses to EPA's First Set of Discovery Related to Detroit Edison's Preliminary Injunction Opposition (served on November 4, 2010)
E	Letter from Benson (EPA) to Bierbower (Detroit Edison) of 11/15/10
F	Subpoenas and Deposition Notices
G	Detroit Edison's First Set of Interrogatories and Requests for Production to EPA

**EXHIBIT A TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**

From: Benson, Thomas (ENRD) [mailto:Thomas.Benson@usdoj.gov]
Sent: Tuesday, August 17, 2010 4:32 PM
To: Bierbower, Mark
Cc: Michael J Solo Jr; Rubin, James W.; Walinskas, Bethanne (ENRD); Christensen, Ellen (USAMIE)
Subject: RE: US v. DTE: Complaint and waiver of service

Mark,

Thanks for your email. I appreciate your confirmation that DTE will accept email service.

As far as the date of service of the PI motion, we disagree with your analysis of when service was effected. We sent the motion and exhibits to DTE and your law firm by FedEx on Friday, Aug. 6. Per FRCP 5(b)(2)(C), service is complete upon mailing, making the service date Aug. 6. We would not be averse to agreeing to a limited extension to your response to the motion, should you want to discuss that further. However, the additional time you suggested this morning (90 days) is a non-starter for us.

Finally, as we discussed this morning, we believe it is important to proceed with the PI hearing as soon as reasonably practicable. Our AUSA Ellen Christensen plans to contact the Courtroom Deputy tomorrow morning to determine a time for us to talk to her about scheduling matters. Please advise your availability for such a call.

Thanks,

Tom

Thomas A. Benson
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
202-514-5261 (ph)
202-616-6584 (fax)

U.S. Mail Address: P.O. Box 7611, Washington, D.C. 20044-7611
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**EXHIBIT B TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

Plaintiff,

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DTE ENERGY COMPANY, and
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Defendants.

Civil Action No. 2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

**PLAINTIFF'S FIRST SET OF DISCOVERY RELATED TO
DEFENDANTS' PRELIMINARY INJUNCTION OPPOSITION**

Pursuant to Rules 26, 33, and 34 of the Federal Rules of Civil Procedure, Plaintiff requests that Defendants answer this Interrogatory and Request for Production of Documents (collectively "Discovery Requests") within 30 days of service.

GENERAL INSTRUCTIONS

A. Scope of Discovery. These Discovery Requests are directed to Defendants and cover all information in Defendants' possession, custody, and control, including information in the possession of Defendants' officers, employees, agents, servants, representatives, attorneys, or other persons directly or indirectly employed or retained by them, or anyone else acting on Defendants' behalf or otherwise subject to their control, and any merged, consolidated, or acquired predecessor or successor, parent, subsidiary, division, or affiliate.

B. Time Period. Unless otherwise indicated, these Discovery Requests apply to the time period from January 1, 2000 forward.

C. Supplemental Responses. These Discovery Requests are continuing; Defendants' answers must therefore be supplemented, in accordance with Fed. R. Civ. P. 26(e).

D. Privilege. Should you assert that any information requested by any of the following Discovery Requests is privileged, please identify such information, state the privilege asserted, and state all facts giving rise to the assertion of such privilege. With respect to documents to which Defendants assert a privilege, Defendants should identify:

- i. the title of the document;
- ii. the nature of the document (*e.g.*, inter-office memorandum, correspondence, report);
- iii. the author or sender;
- iv. the addressee;
- v. the date of the document;
- vi. the name of each person to whom the original or a copy was shown or circulated;
- vii. the names appearing on any circulation list relating to the document;
- viii. the basis on which privilege is claimed; and
- ix. a summary statement of the subject matter of the document in sufficient detail to permit the court to rule on the propriety of the objection.

E. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.

F. "And" and "Or". The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

G. Vague or Burdensome. It is anticipated that Defendants may object to a particular Discovery Request as vague or burdensome. Plaintiff cannot always determine in advance which Discovery Requests might truly be burdensome to Defendants. It is anticipated

that Defendants will respond to all Discovery Requests to the best of their ability and in good faith, preserving any bona fide objections if necessary. It is further anticipated that Defendants will attempt to obtain clarification or delimiting of Plaintiff's Discovery Requests from the undersigned (who stands ready and willing to do so) if the facts of the particular situation so require.

H. Lack of Information. If you currently lack information to answer any Discovery Request completely, please state or identify:

- a. the responsive information currently available;
- b. the responsive information currently unavailable;
- c. efforts which you intend to make to secure the information currently unavailable; and
- d. when you anticipate receiving the information currently unavailable.

I. Incomplete Response to Discovery Request. If any Discovery Request cannot be answered fully, as full an answer as possible should be provided. State the reason for the inability to answer fully, and give any information, knowledge, or belief that the Defendants have regarding the unanswered portion.

J. Document Production in Lieu of Written Response to Interrogatory. Whenever a full and complete answer to any interrogatory or part of an interrogatory is contained in a document or documents, the documents, if properly identified as answering a specific numbered interrogatory or part of an interrogatory, may be supplied in place of a written answer provided that the specific sections or pages from the document that are responsive to the interrogatory are identified, and the reference to the document is otherwise proper under Fed. R. Civ. P. 33(d).

K. Sources of Information. The source, sources, or derivation of each answer to an

interrogatory should be separately set forth and identified, unless the person signing the answers to the interrogatories under oath knows of his own personal and direct knowledge of the facts or information forming the basis of all answers given.

L. Facts Known by Each Identified Person. To the extent that any of Your interrogatory answers identifies two or more of Your Witnesses (or other persons with knowledge of the facts responsive to a particular interrogatory), please specify in the answer the particular facts known by each identified witness or other person.

M. Documents Previously Provided. Defendants need not reproduce any document that they have previously produced to Plaintiff pursuant to a previous EPA request for information under Section 114 of the Clean Air Act, 42 U.S.C. § 7414, as long as Defendants specifically identify by bates number the documents responsive to a particular document request.

N. Deletions from Documents. Where anything has been deleted from a document produced in response to a Discovery Request:

- a. specify the nature of the material deleted;
- b. specify the reason for the deletion;
- c. when the deletion was made; and
- d. identify the person responsible for the deletion.

O. Sources of Documents. In responding to each request, every source of documents to which Defendants have access should be consulted, regardless of whether the source is within Defendants' immediate possession or control. All documents in the possession of experts or consultants must be consulted.

P. Inability to Respond. Whenever Defendants are unable to produce documents in response to a Document Request, state the steps taken to locate responsive documents.

R. Retention of Documents. Defendants are to retain in their possession, custody, or control, and to refrain from destroying, any document requested herein that is in the Defendants' possession, custody, or control as of the date of service of these requests.

S. Format of Electronic Documents. For any documents kept electronically by Defendants, produce the documents in their electronic format (*i.e.*, as a Microsoft Excel file rather than a printed document or .pdf file).

DEFINITIONS

1. "Communication" means any oral, written, mechanical, electronic, or other transmission of words, symbols, numbers or depictions to a person, entity, file or repository as data or information, including (but not limited to) correspondence, memoranda, or telephone conversations, or notes, recordings, transcriptions of meetings, or of telephone conversations, or any other document that recorded or reflected any such communication.
2. "Consultant" or "consultants" means any person(s) or entity(ies) who advised Defendants or acted as agent(s) for or on behalf of Defendants, whether or not for consideration.
3. "Contractor" or "subcontractor" means any person who has advised Defendants, or who acts or acted as an agent for or on behalf of Defendants, whether or not for consideration.
4. "Defendants" unless otherwise stated herein, means any or all of Defendants DTE Energy Company and Detroit Edison Company, including affiliated companies, predecessors in interest, or successors in interest, and includes, without limitation, their past and present officers, employees, agents, servants, representatives, counsel, consultants, contractors, subcontractors or other persons directly or indirectly employed by Defendants or anyone else, past or present, acting on behalf of or otherwise subject to Defendants' control.
5. "Documents" means all documents as defined in Rule 34(a) of the Federal Rules of Civil Procedure, including, but not limited to, all tangible things including, without limitation, *tape or other forms of audio, visual, or audio/visual recordings, written material, drawings, films, graphs, charts, photographs, phone records, and any retrievable data, whether in computer storage, carded, punched, taped, or coded form, or stored electrostatically, electromagnetically, digitally, or otherwise.* Without limiting the generality of the foregoing, "document" specifically includes all contracts, agreements, forms, correspondence, letters, telegrams, telephone messages

(written or audio recordings), checks, canceled checks, notices, notes, memoranda, records, reports, diaries, minutes, purchase orders, statements, worksheets, summaries, books, papers, manuals, journals, ledgers, audits, maps, diagrams, drafts, blueprints, newspapers, appointment books, desk calendars, notes or summaries of personal interviews or conversations, messages (including, but not limited to reports of telephone conversations and conferences), acknowledgments, telexes, facsimiles, all other written or printed matter or communications of any kind, and all other data compilation from which information can be obtained and translated, if necessary. "Document" or "documentation" also refers to texts or treatises referred to or relied upon by Defendant's expert consultants or witnesses. Every draft or non-identical copy of a document is a separate document as that word is used herein.

6. "Employee Witness(es)" means any of Your current or former employees (including retirees), contractors, managers, executives, directors, or officers that may testify at the preliminary injunction hearing (whether as a fact witness or expert witness), including, but not limited to, such witnesses that You disclose as an expert witness or disclose as a fact witness.

7. "Identify," when used with respect to an individual person, means to provide that person's name, business contact information (address, phone, and email), and area of experience or expertise.

8. "Identify," when used with respect to document(s), means to provide the bates range of the document(s), and if not provided on the face of the document(s), the document's author(s), the document's recipient(s), the title of the document (if any), and the date of the document.

9. "Presentations" means PowerPoint slides, handouts, and other written materials that Your Witness reviewed, and/or provided to, or showed, an audience while lecturing or speaking.

10. "Relate to" or "relating to" means discuss, describe, refer to, reflect, contain, analyze, study, report on, comment on, evidence, comprise, constitute, set forth, consider, recommend, concern, depict, describe, allude, or pertain to.

11. "You" (and any form thereof, including "your") refers to each of the Defendants, or any of their agents, employees, consultants, or contractors, including (a) experts whom Defendants expect to call as witnesses in this case, (b) attorneys retained by Defendants, and (c) persons who have access to the requested information or from whom any Defendant can obtain such information.

12. "Your Witnesses" means any witness that may testify on Defendants' behalf at the preliminary injunction hearing in this matter or provide affidavits or declarations in support of Defendants' opposition to the preliminary injunction motion.

INTERROGATORY

1. For each of Your Witnesses, state with specificity: the witness's qualifications, including a list of all articles, publications, or presentations authored, co-authored, presented or co-presented, and provide a list of all other proceedings in which the witness has testified as an expert or fact witness, including at a trial, at a hearing of any kind, or by deposition; the subject matter(s) of the witness's anticipated testimony at the preliminary injunction hearing; the facts, Documents, and Communications that support or relate to the witness's anticipated preliminary injunction testimony; and any opinions the witness may express, the bases and reasons for those opinions, and the data or other information considered by the witness in forming the opinions.

DOCUMENT REQUEST

1. Produce all documents identified in your responses to the interrogatory above and all documents that were reviewed in preparing those responses or that contain facts which support your responses.

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: October 1, 2010

/s/ Thomas A. Benson
JUSTIN A. SAVAGE
Senior Counsel
THOMAS A. BENSON (MA Bar # 660308)
Trial Attorney
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice

P.O. Box 7611
Washington, D.C. 20530
(202) 514-5261
thomas.benson@usdoj.gov

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

OF COUNSEL:
SABRINA ARGENTIERI
MARK PALERMO
SUSAN PROUT
Associate Regional Counsel
United States Environmental
Protection Agency, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

ELLEN CHRISTENSEN
Assistant United States Attorney
Eastern District of Michigan
211 W. Fort St., Suite 2001
Detroit, MI 48226

APPLE CHAPMAN
Attorney Adviser
United States Environmental
Protection Agency
1200 Pennsylvania Ave. NW
Washington D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2010, the foregoing opposition was served through the on the following counsel for Defendants via FedEx:

Michael J. Solo, Jr.
DTE Energy Co.
One Energy Plaza
Detroit, MI 48226-1279
solom@dteenergy.com

Matthew J. Lund
Pepper Hamilton LLP
100 Renaissance Center
36th Floor
Detroit, MI 48243-1157
lundm@pepperlaw.com

Mark B. Bierbower
F. William Brownell
Makram B. Jaber
James W. Rubin
Hunton & Williams LLP
1900 K Street, NW
Washington DC 20006
mbierbower@hunton.com
bbrownell@hunton.com
mjaber@hunton.com
jrubin@hunton.com

Brent Rosser
Hunton & Williams LLP
101 South Tryon Street
Bank of America Plaza
Suite 3500
Charlotte, NC 28280
brosser@hunton.com

/s/ Thomas A. Benson
Counsel for the United States

**EXHIBIT C TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**



U.S. Department of Justice

Environment and Natural Resources Division

90-5-2-1-09949

*Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611*

*Telephone (202) 514-2750
Facsimile (202) 353-0296*

November 5, 2010

VIA E-MAIL

Mark Bierbower, Esq.
Hunton & Williams LLP
1900 K Street, NW
Washington DC 20006
mbierbower@hunton.com

Re: *United States v. DTE Energy Co., et al., No. 10-13101 (E.D. Michigan)*

Dear Mark:

This letter is in response to Defendants' discovery responses served last night. Defendants have failed to provide a substantive response to Plaintiffs' duly served discovery related to the evidence and witnesses that Defendants may propound at the preliminary injunction hearing. This failure to respond prejudices Plaintiff's ability to prepare for the hearing and will result in a less efficient proceeding, wasting the resources of the Court and the Parties.

Plaintiff's discovery was narrowly targeted to procure information necessary to fully and fairly investigate the testimony of Defendants witnesses. In essence, the discovery asked for the testimony Defendants' potential witnesses may provide, their prior publications and testimony, and the exhibits that may be used in support of their testimony. This is well within the bounds of typical discovery. While the declarations Defendants included in their opposition presumably provide the information and opinions that Defendants' potential witnesses will testify to, Defendants have failed to provide any publications or prior testimony, despite an explicit discovery request.

None of Defendants' justifications can withstand scrutiny:

- Plaintiff's request is not unduly burdensome, and is indeed standard practice in complex civil litigation. It can hardly be disputed that it will be easier for the witnesses to procure their own publications and testimony than for Plaintiffs to do so. Finally, if Defendants truly believed Plaintiff's request required a

burdensome production, you could have sought clarification or limiting before responding, as the instructions to the discovery specifically requested.

- Concerns about DTE confidentiality or third party confidentiality is no reason to preclude production given the protective order entered by the Court in this case. Notably, Defendants have no problem presenting third party confidential information under the protective order when it serves their interest – as they did with materials supporting the declarations of Messrs. Golden and King. This type of one-way use of confidentiality claims is highly inequitable.
- Defendants' claims of privilege are unfounded. First, most of the potential witnesses are experts, and discussions between attorneys and the experts are not privileged. *See, e.g., Regional Airport Authority of Louisville v. LFG, LLC*, 460 F.3d 697, 715 (6th Cir. 2006) ("Rule 26 now requires disclosure of all information provided to testifying experts"). For all Defendants' witnesses, there is no privilege for prior testimony or publications, and the exhibits to be used at the hearing will eventually be exchanged, so there is no basis for a privilege claim.

Defendants' failure to provide *any* responsive documents is particularly prejudicial given the limited time remaining before the preliminary injunction hearing. As you know, Defendants had three months to prepare their opposition to Plaintiff's motion, and Plaintiff served the instant discovery a month ago. Defendants have had plenty of time to provide a meaningful response. Defendants also could have, at any time in the last month, attempted to confer with the undersigned counsel if Defendants truly believed that the discovery requests were unduly burdensome. Instead Defendants chose to provide an empty response without conferring.

Please let me know your availability, or that of your co-counsel, to meet and confer concerning this matter before close of business Monday, November 8. In addition, please be prepared to discuss an expedited briefing schedule should the Parties not be able to resolve this dispute.

Sincerely,

s/Thomas A. Benson
Thomas A. Benson
Trial Attorney

cc : Counsel of Record

**EXHIBIT D TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE
COUNCIL, INC. AND SIERRA CLUB,

Proposed Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman
Magistrate Judge R. Steven Whalen

**DEFENDANTS' OBJECTIONS AND RESPONSES TO
PLAINTIFF'S FIRST SET OF DISCOVERY RELATED
TO DEFENDANTS' PRELIMINARY INJUNCTION OPPOSITION**

Pursuant to Rules 26, 33 and 34 of the Federal Rules of Civil Procedure, Defendants DTE Energy Company and Detroit Edison Company (collectively, "Defendants"), by and through their undersigned attorneys, hereby respond and object to Plaintiff United States of America's ("EPA") First Set of Discovery Related to Defendants' Preliminary Injunction Opposition ("Discovery Requests").

At the outset, Defendants object to these Discovery Requests on the ground that they are premature and inconsistent with the nature, purpose and objective of preliminary injunction proceedings, as set forth more fully in Defendants' Motion to Strike EPA's Motion for Preliminary Injunction and Reply in support thereof. *See* Doc. Nos. 15 and 33. Moreover, Defendants expressly reserve until the time of trial all evidentiary objections and expressly

disclaim any intent to accept or admit the relevance of the matters inquired into or the information provided in response to these Discovery Requests. These responses to the Discovery Requests are based on the best information available to Defendants at this time. Defendants reserve the right to amend or supplement these responses should any additional and/or different information become available.

GENERAL OBJECTIONS

Each of the following general objections and responses is incorporated into the responses and objections to each specific request:

1. Defendants object to EPA's Discovery Requests to the extent that they seek to impose upon Defendants obligations that exceed or differ from those imposed by the Federal Rules of Civil Procedure.

2. Defendants reserve all, and expressly do not waive any, privileges, including but not limited to the attorney-client privilege and the work-product doctrine, and respectfully decline to respond to EPA's Discovery Requests to the extent that any responses would reveal privileged material.

3. To the extent that the Discovery Requests may be construed to refer to all persons who have any information or knowledge or to each person who had any involvement, regardless of how tangential or indirect, Defendants object to the Discovery Requests on the grounds that they are overbroad, unduly burdensome, vague, do not specify the information sought with sufficient particularity, and are not reasonably calculated to lead to the discovery of admissible evidence.

4. To the extent that the Discovery Requests may be construed to refer to any person who performed purely clerical or ministerial tasks, Defendants generally object to the Discovery

Requests on the grounds that they are unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

5. Defendants object to each request to the extent that it seeks information outside Defendants' possession, custody, or control.

6. Defendants generally object to the Discovery Requests to the extent that they seek to discover information that is confidential as to any third party or any non-party to this litigation. *See, e.g.*, Doc. No. 39.

7. Each response is subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility and any and all other objections and grounds that would require the exclusion of any statement or document contained herein if any requests were asked of, or if any statements contained herein were offered by, a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of trial.

8. Defendants object to the "Definitions" and "Instructions" in that they are vague, ambiguous, overbroad, unduly burdensome, oppressive, erroneous or exceed the definitions required by the Federal Rules of Civil Procedure, including but not limited to the following:

- a. Defendants object to the definition of "communication" on the grounds that the definition is overbroad, unduly burdensome, and contrary to the parties' agreement regarding electronic discovery. *See* Doc. No. 43.
- b. Defendants object to the definition of "document" on the grounds that the definition is overbroad, unduly burdensome, and contrary to the parties' agreement regarding electronic discovery. *Id.*
- c. Defendants object to the definition of "consultant" on the ground that the term is overly broad and its use will make the interrogatory unduly burdensome.

As defined in the Discovery Requests, "consultant" would cover any and all persons who, at any time, provided any advice of any type to, or acted as an agent in any manner for, either Defendant. Such a definition is unmanageable and unreasonably expands the universe of discoverable information.

- d. Defendants object to the definitions of "contractor" and "subcontractor" on the ground that the term is overly broad and its use will make the interrogatory unduly burdensome. As defined in the Discovery Requests, these terms would cover any and all persons who, at any time, provided any advice of any type to, or acted as an agent in any manner for, either Defendant. Such a definition is unmanageable and unreasonably expands the universe of discoverable information.
- e. Defendants object to the definition of "you" on the ground that it is overly broad and seeks information that is protected from discovery by the attorney-client privilege and the work product doctrine.
- f. Defendants object to the definition of "relate to" or "relating to" on the grounds that the definitions given are vague and overly broad and their use will make the interrogatory unduly burdensome.

9. Defendants object to each interrogatory to the extent that it or any pertinent portion seeks to use a term that is undefined or unexplained within the context of the interrogatory. Each Defendant's answers and responses are based upon its own understanding of undefined or unexplained terms.

INTERROGATORY

1. For each of Your Witnesses, state with specificity: the witness's qualifications, including a list of all articles, publications, or presentations authored, co-authored, presented or

co-presented, and provide a list of all other proceedings in which the witness has testified as an expert of fact witness, including at a trial, at a hearing of any kind, or by deposition; the subject matter(s) of the witness's anticipated testimony at the preliminary injunction hearing; the facts, Documents, and Communications that support or relate to the witness's anticipated preliminary injunction testimony; and any opinions the witness may express, the bases and reasons for those opinions, and the data or other information considered by the witness in forming the opinions.

RESPONSE:

Defendants object to this request on the ground that it seeks information protected from disclosure by the attorney-client privilege and on the ground that it seeks disclosure of the mental impressions, conclusions, opinions, and/or legal conclusions of the attorneys representing Defendants in this action. Defendants further object to this request as premature because Defendants have not yet identified the witnesses who will testify at any preliminary injunction hearing. Defendants also object to this request on the ground that it imposes an undue burden. Answering further, Defendants object to this request to the extent it seeks information outside Defendants' possession, custody, or control and/or seeks to discover information that is confidential as to any third party or any non-party to this litigation. Subject to and without waiving these objections and the General Objections, Defendants respond to this request by referring EPA to the brief and declarations filed today in support of Defendants' opposition to EPA's motion for a preliminary injunction. In particular, these materials contain non-privileged information responsive to this request, including but not limited to qualifications, lists of proceedings in which the declarant has testified, facts supporting the declarant's testimony, documents or citations to documents supporting the declarant's testimony, and the declarant's opinions. Defendants reserve the right to amend or supplement this response should additional information become available.

DOCUMENT REQUEST

1. Produce all documents identified in your responses to the interrogatory above and all documents that were reviewed in preparing those responses or that contain facts which support your responses.

RESPONSE:

Defendants object to this request on the ground that it seeks information protected from disclosure by the attorney-client privilege and on the ground that it seeks disclosure of the mental impressions, conclusions, opinions, and/or legal conclusions of the attorneys representing Defendants in this action. Defendants further object to this request as overbroad insofar as it requests documents that are publicly available, already in EPA's possession, and/or not reasonably calculated to lead to the discovery of admissible evidence. Responding further, Defendants object to this request as unduly burdensome. Subject to and without waiving these objections and the General Objections, Defendants respond to this request by referring EPA to the brief and declarations filed today in support of Defendants' opposition to EPA's motion for a preliminary injunction. In particular, these materials contain non-privileged information responsive to this request, including but not limited to qualifications, lists of proceedings in which the declarant has testified, facts supporting the declarant's testimony, documents or citations to documents supporting the declarant's testimony, and the declarant's opinions. Defendants reserve the right to amend or supplement this response should additional information become available.

Dated: November 4, 2010

Matthew J. Lund (P48632)
Pepper Hamilton LLP
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243
lundm@pepperlaw.com
(313) 393-7370

Michael J. Solo (P57092)
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DTE Energy
One Energy Plaza
Detroit, Michigan
solom@dteenergy.com
(313) 235-9512

By: B. A. Rosser

F. William Brownell
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Mark B. Bierbower
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mjaber@hunton.com
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Hunton & Williams LLP
1900 K Street, N.W.
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(202) 955-1500

Brent A. Rosser
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101 South Tryon Street
Suite 3500
Charlotte, North Carolina 28211
brosser@hunton.com
(704) 378-4707

Counsel for Defendants

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing **Defendants' Objections and Responses to Plaintiff's First Set of Discovery Related to Defendants' Preliminary Injunction Opposition** was served upon the parties to this matter by regular U.S. Mail and addressed as follows:

Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226
313-226-9100
Email: ellen.christensen@usdoj.gov

Thomas Benson
U.S. Department of Justice
Environmental and Natural Resource Div.
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
202-514-5261
Email: Thomas.Benson@usdoj.gov

Holly Bressett
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
Phone: (415) 977-5646
Email: Holly.Bressett@sierraclub.org

This 4th day of November, 2010.



**EXHIBIT E TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**



U.S. Department of Justice

Environment and Natural Resources Division

90-5-2-1-09949

*Environmental Enforcement Section
P.O. Box 7611
Washington, DC 20044-7611*

*Telephone (202) 514-2750
Facsimile (202) 353-0296*

November 15, 2010

VIA E-MAIL

Mark Bierbower, Esq.
Hunton & Williams LLP
1900 K Street, NW
Washington DC 20006
mbierbower@hunton.com

Re: *United States v. DTE Energy Co., et al., No. 10-13101 (E.D. Michigan)*

Dear Mark:

This will respond to your letter of November 12, 2010. I appreciate that DTE is willing to produce the documents we sought in discovery. However, we cannot accept your failure to make your witnesses available for deposition.

There is no grounds to forestall discovery in this case. As you are aware, the Federal Rules of Civil Procedure generally restrict discovery until the Parties confer pursuant to Rule 26(f). We conducted that Rule 26(f) conference on September 24, 2010. The normal rules of discovery thus control, and there is nothing to preclude depositions. Moreover, DTE's opposition appears to take issue with a number of material facts in Plaintiffs' motion for preliminary injunction through highly technical submissions by company employees and expert witnesses. The depositions proposed by Plaintiffs will help narrow and focus those issues for the hearing and provide discovery necessary to prepare for the hearing.^{1/}

^{1/} Contrary to DTE's position, the United States believes that an evidentiary hearing will be necessary in this matter. As I stated in our telephone conversation Friday, if the Court ultimately decides no testimony is necessary or that certain witnesses need not testify, we can cancel scheduled depositions as appropriate. However, it would be short-sighted to forestall scheduling depositions based on DTE's unilateral *belief* that none are necessary.

Please provide availability for Dr. Wolff and Messrs. Boyd, Campbell, King, and Rogers by Wednesday, November 17. If you continue to make your witnesses available for deposition, we will simply serve notices and subpoenas for them.

Thank you for your attention to this important matter.

Sincerely,

s/Thomas A. Benson
Thomas A. Benson
Trial Attorney

cc : Counsel of Record

**EXHIBIT F TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, the foregoing Notice of Deposition of Colin Campbell was served electronically, and by Overnight Delivery, to counsel for Defendants listed below:

Mark B. Bierbower
F. William Brownell
James W. Rubin
Makram B. Jaber
Brent A. Rosser
HUNTON & WILLIAMS LLP
1900 K Street, NW
Washington, D.C. 20006-1109

Matthew J. Lund
PEPPER HAMILTON LLP
100 Renaissance Center, 36th Floor
Detroit, MI 48243

Michael J. Solo
DTE ENERGY
One Energy Plaza
Detroit, Michigan 48226

/s/ Thomas A. Benson
Thomas A. Benson
Trial Attorney

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action

UNITED STATES DISTRICT COURT

for the
Eastern District of North Carolina

United States)	
Plaintiff)	
v.	)	Civil Action No. 2:10-cv-13101-BAF-RSW
DTE Energy Co., et al.)	
Defendant	)	(If the action is pending in another district, state where: Eastern District of Michigan

SUBPOENA TO TESTIFY AT A DEPOSITION
OR TO PRODUCE DOCUMENTS IN A CIVIL ACTION

To: Colin Campbell
RTP Environmental Associates, Inc., 304-A West Millbrook Road, Raleigh, N.C. 27609

☒ **Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: U.S. Department of Justice 601 D Street NW Washington, D.C. 20004	Date and Time: 12/07/2010 9:00 am
--	--------------------------------------

The deposition will be recorded by this method: Stenographic

☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/19/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Thomas Benson
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) United States Plaintiff,
Thomas Benson, Trial Attorney, U.S. Department of Justice, 601 D Street, N.W., Washington, D.C. 20004, who issues or requests this subpoena, are:

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action (Page 2)

Civil Action No. 2:10-cv-13101-BAF-RSW

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I personally served the subpoena on the individual at *(place)* _____
on *(date)* _____; or

☐ I left the subpoena at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the subpoena on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____; or

☐ I returned the subpoena unexecuted because _____; or

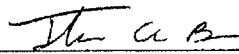
☒ Other *(specify)*: Subpoena was served by electronic and overnight mail on counsel of record for DTE Energy Co. on behalf of Colin Campbell

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 11/19/2010



Server's signature

Thomas A. Benson, Trial Attorney, U.S. Department of Justice

Printed name and title

601 D Street, NW
Washington, DC 20004

Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA)	
)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
)	
v.	)	Judge Bernard A. Friedman
)	
DTE ENERGY COMPANY, and	)	Magistrate Judge R. Steven Whalen
DETROIT EDISON COMPANY)	
)	
Defendants.)	
)	

NOTICE TO TAKE DEPOSITION OF MICHAEL J. KING

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff United States of America will take the deposition of Michael J. King, beginning at 9:00 a.m. on December 6, 2010, at the offices of the U.S. Department of Justice, 601 D Street, N.W., Washington, D.C. 20004. The deposition will be taken before a notary public or other individual authorized to administer oaths and will be recorded by stenographic means.

Dated: November 19, 2010

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division

/s/ Thomas A. Benson
JUSTIN A. SAVAGE
Senior Counsel
THOMAS A. BENSON (MA Bar # 660308)
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-5261
thomas.benson@usdoj.gov

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, the foregoing Notice of Deposition of Michael J. King was served electronically, and by Overnight Delivery, to counsel for Defendants listed below:

Mark B. Bierbower
F. William Brownell
James W. Rubin
Makram B. Jaber
Brent A. Rosser
HUNTON & WILLIAMS LLP
1900 K Street, NW
Washington, D.C. 20006-1109

Michael J. Solo
DTE ENERGY
One Energy Plaza
Detroit, Michigan 48226

Matthew J. Lund
PEPPER HAMILTON LLP
100 Renaissance Center, 36th Floor
Detroit, MI 48243

/s/ Thomas A. Benson
Thomas A. Benson
Trial Attorney

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of Colorado

United States)	
Plaintiff)	
v.	)	Civil Action No. 2:10-cv-13101-BAF-RSW
DTE Energy Co., et al.)	
Defendant	)	(If the action is pending in another district, state where: Eastern District of Michigan

SUBPOENA TO TESTIFY AT A DEPOSITION
OR TO PRODUCE DOCUMENTS IN A CIVIL ACTION

To: Michael J. King
National Economic Research Associates (NERA), 10955 Westmoor Drive, Suite 400, Westminster, CO 80021

☒ **Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: U.S. Department of Justice 601 D Street NW Washington, D.C. 20004	Date and Time: 12/06/2010 9:00 am
--	--------------------------------------

The deposition will be recorded by this method: Stenographic

☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

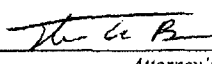
The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/19/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk


Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Plaintiff,
United States, who issues or requests this subpoena, are:
Thomas Benson, Trial Attorney, U.S. Department of Justice, 601 D Street, N.W., Washington, D.C. 20004

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action (Page 2)

Civil Action No. 2:10-cv-13101-BAF-RSW

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I personally served the subpoena on the individual at *(place)* _____
on *(date)* _____; or

☐ I left the subpoena at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the subpoena on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____; or

☐ I returned the subpoena unexecuted because _____; or

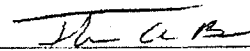
☒ Other *(specify)*: Subpoena was served by electronic and overnight mail on counsel of record for DTE Energy
Co. on behalf of Michael J. King

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 11/19/2010



Server's signature

Thomas A. Benson, Trial Attorney, U.S. Department of Justice

Printed name and title

601 D Street, NW
Washington, DC 20004

Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

Plaintiff,

V.

DTE ENERGY COMPANY, and
DETROIT EDISON COMPANY

Defendants.

Civil Action No. 2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

NOTICE TO TAKE DEPOSITION OF DR. GEORGE T. WOLFF

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff United States of America will take the deposition of Dr. George T. Wolff, beginning at 9:00 a.m. on December 13, 2010, at the offices of the U.S. Department of Justice, 601 D Street, N.W., Washington, D.C. 20004. The deposition will be taken before a notary public or other individual authorized to administer oaths and will be recorded by stenographic means.

Dated: November 19, 2010

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division

/s/ Thomas A. Benson
JUSTIN A. SAVAGE
Senior Counsel
THOMAS A. BENSON (MA Bar # 660308)
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-5261
thomas.benson@usdoj.gov

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, the foregoing Notice of Deposition of Dr. George T. Wolff was served electronically, and by Overnight Delivery, to counsel for Defendants listed below:

Mark B. Bierbower
F. William Brownell
James W. Rubin
Makram B. Jaber
Brent A. Rosser
HUNTON & WILLIAMS LLP
1900 K Street, NW
Washington, D.C. 20006-1109

Michael J. Solo
DTE ENERGY
One Energy Plaza
Detroit, Michigan 48226

Matthew J. Lund
PEPPER HAMILTON LLP
100 Renaissance Center, 36th Floor
Detroit, MI 48243

/s/ Thomas A. Benson
Thomas A. Benson
Trial Attorney

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action

UNITED STATES DISTRICT COURT

for the
Eastern District of Michigan

United States)	
Plaintiff)	
v.	)	Civil Action No. 2:10-cv-13101-BAF-RSW
DTE Energy Co., et al.)	
Defendant	)	(If the action is pending in another district, state where:

SUBPOENA TO TESTIFY AT A DEPOSITION
OR TO PRODUCE DOCUMENTS IN A CIVIL ACTION

To: Dr. George T. Wolff
Air Improvement Resource, Inc., 47298 Sunnybrook Lane, Novi, Michigan 48374

☒ **Testimony:** **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: U.S. Department of Justice 601 D Street NW Washington, D.C. 20004	Date and Time: 12/13/2010 9:00 am
--	--------------------------------------

The deposition will be recorded by this method: Stenographic

- ☐ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

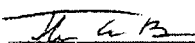
The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/19/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk



Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) United States Plaintiff,
Thomas Benson, Trial Attorney, U.S. Department of Justice, 601 D Street, N.W., Washington, D.C. 20004

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action (Page 2)

Civil Action No. 2:10-cv-13101-BAF-RSW

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I personally served the subpoena on the individual at *(place)* _____
on *(date)* _____; or

☐ I left the subpoena at the individual's residence or usual place of abode with *(name)* _____,
a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the subpoena on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____; or

☐ I returned the subpoena unexecuted because _____; or

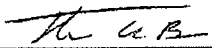
☒ Other *(specify)*: Subpoena was served by electronic and overnight mail on counsel of record for DTE Energy Co. on behalf of Dr. George T. Wolff

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 11/19/2010



Server's signature

Thomas A. Benson, Trial Attorney, U.S. Department of Justice

Printed name and title
601 D Street NW
Washington, DC 20004

Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA)	
)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
)	
v.	)	Judge Bernard A. Friedman
)	
DTE ENERGY COMPANY, and	)	Magistrate Judge R. Steven Whalen
DETROIT EDISON COMPANY)	
)	
Defendants.)	
)	

NOTICE TO TAKE DEPOSITION OF SKILES W. BOYD

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiff United States of America will take the deposition of Skiles W. Boyd, beginning at 9:00 a.m. on December 9, 2010, at the offices of the United States Attorney for the Eastern District of Michigan, 211 W. Fort Street, Detroit Michigan 48226. The deposition will be taken before a notary public or other individual authorized to administer oaths and will be recorded by stenographic means, and may be recorded by videotape.

Dated: November 19, 2010

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division

/s/ Thomas A. Benson
JUSTIN A. SAVAGE
Senior Counsel
THOMAS A. BENSON (MA Bar # 660308)
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-5261
thomas.benson@usdoj.gov

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, the foregoing Notice of Deposition of Skiles W. Boyd was served electronically, and by Overnight Delivery, to counsel for Defendants listed below:

Mark B. Bierbower
F. William Brownell
James W. Rubin
Makram B. Jaber
Brent A. Rosser
HUNTON & WILLIAMS LLP
1900 K Street, NW
Washington, D.C. 20006-1109

Michael J. Solo
DTE ENERGY
One Energy Plaza
Detroit, Michigan 48226

Matthew J. Lund
PEPPER HAMILTON LLP
100 Renaissance Center, 36th Floor
Detroit, MI 48243

/s/ Thomas A. Benson
Thomas A. Benson
Trial Attorney

BARBARA McQUADE
United States Attorney
Eastern District of Michigan

ELLEN CHRISTENSEN
Assistant United States Attorney
211 W. Fort St., Suite 2001
Detroit, MI 48226

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2010, the foregoing Notice of Deposition of William Rogers was served electronically, and by Overnight Delivery, to counsel for Defendants listed below:

Mark B. Bierbower
F. William Brownell
James W. Rubin
Makram B. Jaber
Brent A. Rosser
HUNTON & WILLIAMS LLP
1900 K Street, NW
Washington, D.C. 20006-1109

Michael J. Solo
DTE ENERGY
One Energy Plaza
Detroit, Michigan 48226

Matthew J. Lund
PEPPER HAMILTON LLP
100 Renaissance Center, 36th Floor
Detroit, MI 48243

/s/ Thomas A. Benson
Thomas A. Benson
Trial Attorney

**EXHIBIT G TO
DETROIT EDISON'S
BRIEF IN SUPPORT
OF MOTION FOR
PROTECTIVE
ORDER**

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE
COUNCIL, INC. AND SIERRA CLUB,

Proposed Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND
DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

**DEFENDANTS' FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION TO PLAINTIFF**

Pursuant to Rules 26, 33 and 34 of the Federal Rules of Civil Procedure, Defendants DTE Energy Company and Detroit Edison Company (collectively, "Defendants") submit their First Set of Interrogatories and Requests for Production to Plaintiff. Though Defendants believe that no discovery is appropriate in advance of any preliminary injunction hearing, Defendants serve these requests in the event the Court finds that some limited discovery should be permitted. In that case, Defendants request that Plaintiff respond to these discovery requests within thirty (30) days from the date of service or within five (5) days of the Court's determination, whichever is later.

DEFINITIONS AND INSTRUCTIONS

1. The term "person" shall include any natural person, corporation, partnership, proprietorship, association, joint venture, governmental or other public entity, or any other form of organization or legal entity, and all their officials, directors, officers, employees, representatives, and agents.

2. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

3. The term "relate to" means any document which mentions, reflects, directs attention to the matter or is in any way connected with the matter.

4. The term "Plaintiff" means Plaintiff United States of America, acting by authority of the Attorney General of the United States and includes the Administrator and the United States Environmental Protection Agency, including its present and former officers, administrators, managers, directors, employees, agents, attorneys (including, but not limited to, the Attorney General of the United States and the U.S. Department of Justice), and affiliates, and all other persons acting or purporting to act on its behalf, as well as all other federal agencies or instrumentalities that own, operate, or are responsible for the installation, operation, or regulation of fossil fuel-fired boilers, including, but not limited to, the Department of Defense, the Federal Bureau of Prisons, the Department of Energy, the Federal Energy Regulatory Commission, and any other federal agency with the exception of the Tennessee Valley Authority.

5. The term "document" means any recording of information in tangible or electronic form. The term includes, but is not limited to, all of the following items, whether written or produced by hand; or printed, written, produced, recorded or reproduced by any mechanical process; or electronically or magnetically recorded or stored; or recorded upon any

tangible thing; or stored in any retrievable form; by any means of communication, representation or data retention not described heretofore in this paragraph: agreements, contracts, communications, interoffice communications, correspondence, memoranda, e-mail, summaries or records of personal conversations or interviews, statements, diaries, desk calendars, graphs, reports, computer print-outs, notebooks, notes, charges, plans, drawings, maps, records of meetings or conferences, summaries or reports of investigations or negotiations, manuals, guidance documents, opinions or reports of consultants, photographs, audio or video recordings, microfilm, microfiche, pamphlets, advertisements, press releases, letters, telefaxes, notices, bulletins, tabulations, questionnaires, judicial records, transcripts, depositions, written discovery responses, notes of testimony, journals, ledgers, purchase orders, invoices, blueprints, specifications, diagrams, governmental certificates, permits, registrations, licenses, filings, reports or notices; and any marginal comments appearing on any documents, including information or documents on internet websites pages or information linked thereto, now or at any time in your possession, custody, or control, or known to you, whether or not prepared by you. A draft or non-identical copy is a separate document within the meaning of this term.

6. The terms "you" and "your" refer to Plaintiff.

7. The term "Witness" means any person that (1) may testify on Plaintiff's behalf at any preliminary injunction hearing in this matter; or (2) submitted a declaration in support of Plaintiff's Motion for Preliminary Injunction, filed on August 6, 2010. *See* Doc. No. 8.

8. In order to bring within the scope of these requests all conceivably relevant information which might otherwise be construed to be outside their scope: (a) the singular of each word shall be construed to include its plural and vice versa; (b) "and" as well as "or" shall be construed both conjunctively as well as disjunctively; (c) "each" shall be construed to include

“every” and vice versa; (d) “any” shall be construed to include “all” and vice versa; (e) the present tense shall be construed to include the past tense and vice versa; and (f) the masculine shall be construed to include the feminine and vice versa.

9. If you believe that any of the following requests calls for assertion of a claim of privilege, answer so much of the request as is not objected to, state that part of each request to which you object and set forth the basis for your claim of privilege with respect to such information as you refuse to give.

10. If, for reasons other than a claim of privilege, you refuse to answer any request, please state the grounds upon which the refusal is based with sufficient specificity to permit a determination of the propriety of such refusal.

11. If any information called for by these requests is not available or accessible in the full detail requested, such requests shall be deemed to call for sufficient explanation of the reasons therefore, as well as for the best information available or accessible, set forth in as detailed a manner as possible, including, if specific information is not presently available or accessible, your best estimate of the information called for and an explanation of the basis on or method by which you arrived at such estimate.

12. These requests are continuing so as to require the filing of supplemental responses promptly in the event that Plaintiff, by or through any of its agents, counsel or other representatives, learns additional facts relevant to any request not set forth in its initial responses or discovers that any information given in a response is erroneous or misleading.

INTERROGATORIES

1. For each Witness, state with specificity: the Witness's qualifications, including a list of all articles, publications, or presentations authored, co-authored, presented, co-presented or edited, and provide a list of all other proceedings in which the Witness has testified as an expert or fact witness, including at a trial, at a hearing of any kind, by deposition, by affidavit, or by declaration; the subject matter(s) of the Witness's anticipated testimony at any preliminary injunction hearing in this matter; the facts, documents, and communications that support or relate to the Witness's anticipated preliminary injunction testimony; and any opinions the Witness may express, the bases and reasons for those opinions, and the data or other information considered by the Witness in forming the opinions.

RESPONSE:

2. Identify all persons who provided any Witness with facts, data, opinions or other information which the Witness considered or will consider in arriving at his or her opinion. For each person identified in response to this interrogatory, provide: the person's name, occupation or profession, job title, home address and telephone number, and work address and telephone number; the name of the Witness to whom the person provided such facts, data, opinions or other information and a detailed description of the facts, data, opinions or other information provided; a description of all relevant training and experience the person has completed and the date completed.

RESPONSE:

DOCUMENT REQUESTS

1. Produce all documents identified in your responses to the interrogatories above and all documents that were reviewed in preparing those responses or that contain facts which support your responses.

RESPONSE:

2. Produce all transcripts of testimony given by any Witness whether at a trial, at a hearing of any kind, by deposition, by affidavit, or by declaration.

RESPONSE:

3. Produce all written reports or opinions submitted by any Witness in any other case, any administrative proceeding, or any hearing of any kind.

RESPONSE:

Dated: November 12, 2010

Matthew J. Lund (P48632)
Pepper Hamilton LLP
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243
lundm@pepperlaw.com
(313) 393-7370

Michael J. Solo (P57092)
Office of the General Counsel
DTE Energy
One Energy Plaza
Detroit, Michigan
solom@dteenergy.com
(313) 235-9512

By: 

F. William Brownell
brownell@hunton.com
Mark B. Bierbower
mbierbower@hunton.com
Makram B. Jaber
mjaber@hunton.com
James W. Rubin
jrubin@hunton.com
Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006-1109
(202) 955-1500

Brent A. Rosser
Hunton & Williams LLP
101 South Tryon Street
Suite 3500
Charlotte, North Carolina 28211
brosser@hunton.com
(704) 378-4707

Counsel for Defendants

CERTIFICATE OF SERVICE

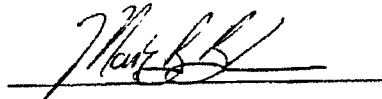
I hereby certify that a true and correct copy of the foregoing **Defendants' First Set of Interrogatories and Requests for Production to Plaintiff** was served upon the parties to this matter by regular U.S. Mail and addressed as follows:

Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226
313-226-9100
Email: ellen.christensen@usdoj.gov

Thomas Benson
U.S. Department of Justice
Environmental and Natural Resource Div.
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044
202-514-5261
Email: Thomas.Benson@usdoj.gov

Holly Bressett
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105
Phone: (415) 977-5646
Email: Holly.Bressett@sierraclub.org

This 12th day of November, 2010.

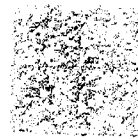




**HUNTON &
WILLIAMS**

HUNTON & WILLIAMS LLP • BANK OF AMERICA PLAZA • SUITE 3500
101 SOUTH TRYON STREET • CHARLOTTE • NORTH CAROLINA • 28280

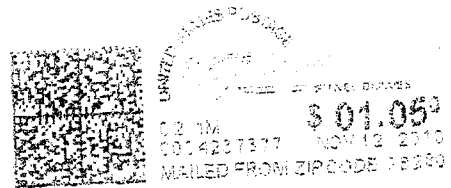
Ellen E. Christensen
U.S. Attorney's Office
211 W. Fort Street
Suite 2001
Detroit, MI 48226



**HUNTON &
WILLIAMS**

HUNTON & WILLIAMS LLP • BANK OF AMERICA PLAZA • SUITE 3500
101 SOUTH TRYON STREET • CHARLOTTE • NORTH CAROLINA • 28280

Holly Bressett
Sierra Club Environmental Law Program
85 Second St., 2nd Floor
San Francisco, CA 94105



**HUNTON &
WILLIAMS**

HUNTON & WILLIAMS LLP • BANK OF AMERICA PLAZA • SUITE 3500
101 SOUTH TRYON STREET • CHARLOTTE • NORTH CAROLINA • 28280

Thomas Benson
U.S. Department of Justice
Environmental and Natural Resource Div.
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044